December 7, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: *Restoring Internet Freedom,* WC Docket No. 17-108

Dear Ms. Dortch:

Since 2004, when the Federal Communications Commission ("FCC") first addressed net neutrality in an official way, consumers and edge providers have relied on some form of FCC-enforced open internet protections to ensure that internet service providers ('ISPs") do not discriminate, manipulate, or alter traffic going over their networks. This ensures a proper marketplace on the internet without undue influence from infrastructure providers. The proposed order, which would repeal open internet protections and abdicate meaningful FCC oversight of the ISP market, would upset these reliance interests and trigger an enhanced explanation required by *FCC v. Fox.*

When an Administrative Agency's Policy Engenders Reliance Interests, Changes to that Policy Require a More Detailed Justification than When the Agency Creates Policy from a Blank Slate

In the plurality decision in *FCC v. Fox*,[1] the Supreme Court established the general rule that an agency action changing prior policy does not require a more substantial explanation than if the agency had acted in the first instance. In that case, the Court held that the FCC's change in position on fleeting expletives was not arbitrary and capricious because the agency acknowledged its change in position and provided rational reasons for its new position, thus meeting Administrative Procedure Act requirements.

In certain circumstances, however, a reviewing court will impose a higher standard. When a policy has engendered reliance interests, a reviewing court will look for "a more detailed justification than what would suffice for a new policy created on a blank slate . . . when, for

[1] Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. 502 (2009) ("*Fox*").

example, . . . its prior policy has engendered serious reliance interests that must be taken into account."[2] The Court stated in *Fox* that ignoring the interests of those that have relied on prior policy would be arbitrary and capricious.[3] Thus, when an agency's policy engenders reliance interests, changing that position requires the agency to provide a stronger explanation than is normally necessary.[4]

Consumers and edge providers have come to rely on an FCC-enforced open internet regime that ensures consumers can access the content they desire without ISP interference or discrimination

Beginning in 2004, the FCC has sought to protect the open internet through a series of agency documents, proceedings, and rulemakings. For more than a decade, the FCC has had rules on the books, policy statements favoring net neutrality protections, and clear enforcement actions against discriminatory conduct, all of which reduced incentives for broadband providers to discriminate based on content. These actions occurred under both Republican and Democratic administrations. In February 2004, Republican FCC Chairman Michael Powell argued that "consumers are entitled to 'internet freedom'" and challenged the industry to honor four specific net neutrality principles.[5] The following year, the FCC adopted these principles in an informal policy statement.[6] The FCC enforced these principles early on: prior to issuing the informal policy statement, the FCC took action in response to complaints that an internet service provider was blocking VoIP traffic which resulted in a consent decree;[7] the FCC forced broadband providers to accept the principles as binding conditions on the approval of mergers in 2005[8] and 2007.[9] The FCC then opened a proceeding in 2007 to formalize these principles, and that proceeding resulted in the 2010 Open Internet Order.[10] In 2014, the D.C. Circuit vacated much of that order on authority grounds, and the FCC initiated a new proceeding to again determine how to adopt these principles. After extensive public comment, the FCC finally put the open internet rules on firm legal grounding by reclassifying broadband providers as Title II telecommunications carriers, providing the authority necessary to pass strong open internet

---

[2] *Fox* at 515-16.
[3] *Id*.
[4] The Supreme Court firmly established the reliance interests requirement in Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117 (2016).
[5] Michael K, Powell, Preserving Internet Freedom: Guiding Principles for the Industry, at 5 (Feb. 8, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.
[6] Policy Statement, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14986, para. 4-5 & n. 15 (2005).
[7] Order, Madison River Communications LLC, 20 FCC Rcd 4295 (2005).
[8] Memorandum Opinion & Order, SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290 (2005).
[9] Memorandum Opinion & Order, AT&T Inc. and BellSouth Corporation Application for Transfer of Control, 22 FCC Rcd 5662, app. F, at 5814-15 (2007).
[10] Report & Order, *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010).

protections. The D.C. Circuit upheld this Order in 2015 and denied rehearing en banc.[11] The current proceeding seeks to undo this classification and the rules themselves.

Consumers and edge providers have clear reliance interests in the FCC's open internet protections. Without such rules in place, it is almost certain that broadband providers would be engaging in substantial content and traffic discrimination for a variety of purposes, with little to no recourse for consumers or edge providers. Both an edge provider's ability to succeed and a consumer's ability to engage in online commerce, speech, and other daily activities would be called into question if broadband providers begin engaging in widespread traffic discrimination.

In prior proceedings, commenters (consumer advocates and edge providers alike) have pointed to the need for strong, enforceable, and predictable open internet rules that will increase certainty for consumers and edge providers that content will be delivered to consumers who desire it. For instance, consumer groups in 2009 wrote about protecting online investment and the online economy: "[i]nvestment in the applications and content subsectors will be substantially and negatively impacted by the abandonment of Net Neutrality, and as a result, overall growth in the U.S. economy will suffer[,]"[12] and "[n]etwork neutrality protects the revenue generated by Internet content providers, increasing their incentive to invest."[13]

In 2017, NASUCA argued "[c]onsumer reliance on [open] access to Internet content is the bedrock of a free Internet. Protecting consumers from ISP interference is as compelling today as it was in 2015."[14] Consumers themselves have repeatedly expressed their reliance on stable, non-discriminatory internet access in consumer complaint forums. For example, one Comcast customer posted the following in an online forum during the interconnection disputes of 2014:

> My needs are simple—I work in a local university hospital, and sometimes need to connect from home overnight or on weekends for urgent patient cases. So when I'm not using the connection as a home internet connection, I primarily connect to a VPN with a Citrix server, which hosts some proprietary software that displays certain patient data and relevant video. Video is vital to what I do, so I require reasonable speed. At certain times of the day I've managed to get 15mbit/s down, and video runs at a decent speed. At peak times, however, I rarely see speeds upward of 700kbit/s down from the VPN, and the video is so slow as to be unusable, I might as well hop in my car and drive to work. . . . I have tried our local IT contacts, but they have been of limited assistance (of the "unplug and reboot your computer" variety).Thanks![15]

---

[11] *USTA v. FCC*, Order Denying Rehearing en Banc, Dkt. 15-1063, May 1, 2017 https://www.cadc.uscourts.gov/internet/opinions.nsf/06F8BFD079A89E13852581130053C3F8/$file/15-1063-1673357.pdf

[12] Comments of Free Press at 69 (Jan. 14, 2010), Dkt. 09-191.

[13] Comments of Institute for Policy Integrity at New York University School of Law at 4, (Apr. 26, 2010), Dkt. 09-191.

[14] Comments of NASUCA at 9 (July 17, 2017). *See also* Comments of CCIA at 36 (July 17, 2017).

[15] Susan Crawford, *The Cliff and the Slope*, Wired (Oct. 30, 2014), https://www.wired.com/story/jammed/.

Consumer reliance on open internet protections is especially acute for telecommuters. In 2014, the American Society of Civil Engineers explained the spillover effects of interconnection disputes on people who connect to their employers via home internet connections: "Telecommuters can lose their jobs over these kinds of issues."[16]

Independent filmmakers also noted their reliance on open internet protections in 2017:

> There is ample evidence in the history of U.S. cinema, broadcast and cable television that infrastructure providers look to control content to feed their own networks and then displace outside suppliers[.]
>
> . . . .
>
> [C]urrent conditions in the video and online marketplace, as well as the record underlying the 2015 Open Internet Order, amply support the need for enforceable regulations that will protect the ability of third party providers of legal content, services and applications to rely on broadband access to reach consumers and to deliver the broad array and choice of content that U.S. public policy seeks to inspire.[17]

Online companies have filed similar arguments. For instance, in 2005, Amazon wrote the following:

> Companies that provide . . . consumer content and applications will not invest in it without assurances that users will be able to reach their offerings without interference from broadband service providers. The success of broadband Internet access is dependent on users being able to access the products and services they want to reach with their fast connections.
>
> . . . .
>
> Content providers cannot be expected to make substantial new investments absent assurances that consumers will be able to reach their products without discriminatory interference from broadband service providers.[18]

In 2007, Google filed the following:

> For nearly thirty years, the FCC has presided over a regulatory framework that resulted in a network neutral market environment. The antecedent to the current

---

[16] Open Technology Institute, *Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes*, (Nov. 2014) at 5 (included as an attachment to this ex parte filing).
[17] Comments of the Independent Film and Television Alliance at 2 (July 17, 2017).
[18] Notice of Ex Parte by Amazon.com at 14, 16 (filed Aug. 2, 2005), Dkts. 02-52 et al.

> debate over network neutrality lies in the narrowband world of dial-up online services, which began in the late 1970s. To a large extent, where we are now, and where we are going, is based on where we have been.
>
> . . . .
>
> Among other downsides, broad "principles" without consistent, enforceable rules risk a significant chilling effect on innovators who rely upon regulatory clarity to assure the existence of Internet platforms without artificial barriers.[19]

In 2009, Skype argued that a policy that providers "greater certainty" and "will set consumers free to use their broadband connections to access, organize, and disseminate knowledge" will benefit "all concerned in the broadband Internet ecosystem."[20] And in 2017, Etsy argued that its business relies on the ability of its sellers to reach their customers, which in turn means sellers are "dependant on strong, enforceable net neutrality protections."[21]

Libraries also rely on an open internet and strong open internet policies. The Association of Research Libraries filed comments in this proceeding providing specific examples of projects that would have been more difficult or impossible to engage in without an open internet. One such example includes "DocSouth," a program designed to document and dissemination information about the American south and its history.[22] Several state Attorneys General also argued "consumer reliance on unfettered access to Internet content continues to grow."[23]

Other edge providers have argued they rely on strong open internet policies as well. Engine, which represents hundreds of small start-up companies, stated the following in a 2014 ex parte:

> The Commission's long-standing commitment and actions undertaken to protect the open Internet are a central reason why the Internet remains an engine of entrepreneurship and economic growth…. This Commission should take the necessary steps to ensure that the Internet remains an open platform for speech and commerce so that America continues to lead the world in technology markets.[24]

Engine echoed these concerns in its 2017 filing, stating that

> Strong net neutrality rules are the bedrock of an open and free Internet. In reliance on these protections, investors have poured billions into startups that

---

[19] Comments of Google at 5 (June 15, 2007), Dkt. 07-52.
[20] Comments of Skype at i (Apr. 26, 2010), Dkt. 09-191.
[21] Comments of Etsy at 2 (July 17, 2017).
[22] Reply Comments of the Association of Research Libraries at 4 (Aug. 29, 2017).
[23] Revised Comments of the Attorneys General of the States of Illinois, et al. at 17 (May 18, 2017).
[24] Notice of Ex Parte by Engine and Julie Samuels (May 7, 2014), Dkt. 14-28.

> have changed the world, creating countless new jobs and vast economic growth in the process. Eliminating these rules, as the present NPRM proposes, would severely disrupt the future potential of the Internet sector.[25]

Netflix reminded the FCC in its recent comments that "[w]hen Netflix was starting out, an open internet enabled us to offer consumers an innovative option for watching movies and TV shows" and went on to argue that broadband provider are still gatekeepers and Netflix continues to rely on open internet protections.[26] INCOMPAS argued that many new services and platforms

> rely on the protections of the Open Internet order to bring innovative content and services to millions of consumers. And these are not all new-fangled inventions from technology companies. Real-estate agents, local appliance dealers and other businesses up and down Main Street are increasingly providing goods and services that are network-dependent that consumers access via the Internet. For example, online markets like Zillow or Trulia linking realtors with homebuyers are increasingly popular.[27]

For its part, OTI has brought up these concerns as well. In July 17, 2014, comments, OTI argued that "[i]n the absence of strong net neutrality rules, investment in the tech industry could easily suffer."[28]

Network providers also want certainty. For instance, XO Communications argued in 2010 that "[i]n light of the *Comcast* decision, and to avoid the uncertainty and delay that would likely result if the Commission were to rely exclusively on Title I authority, XO believes the Commission should reasonably exercise its Title II jurisdiction consistent with providing certainty."[29]

Consumer and edge provider reliance interests have been clearly identified in the record. Any policy changes that would upset these reliance interests requires a heightened explanation for why the FCC is changing course despite these reliance interests.

The FCC's Recent Notice of Proposed Rulemaking Threatens to Upset These Reliance Interests

Now that consumers' and edge providers' reliance interests in a strong, federally-enforced open internet regime has been established, it is clear that the proposed order would upset those interests.

---

[25] Comments of Engine at 31 (July 17, 2017); *see also id*. at 4-24 (explaining in detail how start-ups would be harmed by repealing strong open internet protections).
[26] Comments of Netflix at 2 (July 17, 2017).
[27] Comments of INCOMPAS at 41 (July 17, 2017).
[28] Comments of the Open Technology Institute and Benton Foundation at 3-17 (July 17, 2014), Dkt. 14-28.
[29] Reply Comments of XO Communications at 2 (Apr. 26, 2010), Dkt. 09-191.

First, the draft Order proposes to reclassify BIAS as a Title I service. This effectively eviscerates the FCC's ability to protect consumers. Without Title II authority, the FCC is left with Title I "ancillary" jurisdiction, which has proven a feeble and ineffective source of authority; prior FCC attempts to use that authority to protect the open internet have been futile and Sisyphean.[30] It is blindingly obvious that an abdication of FCC authority to enforce strong open internet rules would significantly affect consumer and edge provider reliance interests.

Second, the draft Order proposes to repeal all conduct-based rules and retain only a weak transparency requirement, backed up by FTC enforcement. [31] The record is replete with reasons why the FCC should retain the rules and why self-governance of the open internet is a farce and why ex post enforcement of open internet standards is toothless.[32] That is not up for debate. What is relevant here is that if the FCC eliminates essentially all open internet protections, some form of which has been in place since 2004, then it has some explaining to do to meet the *Fox* standard.

Conclusion

Consumers and edge providers have deeply entrenched reliance interests, and they have acted in reliance on the certainty provided by strong open internet rules. FCC enforcement has been in place in some form, and has grown stronger as new practices emerged, since 2004. For the FCC to diverge from longstanding regime this would seriously upset these reliance interests, triggering a heightened standard of review under *FCC v. Fox*.

Respectfully submitted,

/s/ Eric Null

Eric Null
Sarah J. Morris
New America's Open Technology Institute
740 15th St NW Suite 900
Washington, DC 20005

[30] Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); Comcast v. FCC, 600 F.3d 642 (2010).
[31] Draft Order, ¶¶ 203-300.
[32] *E.g.*, OTI Comments at 14-21 (July 17, 2017); Free Press Comments at 68 (July 17, 2017).